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October Term, 1963

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EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AND UNITED STEELWORKERS OF AMERICA, AFL-CIO

*Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

AND

FIBREBOARD PAPER PRODUCTS CORPORATION

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 3, 1963.

## OPINIONS BELOW

The original Decision and Order of the National Labor Relations Board (J.A. 35),[1] including the Intermediate

[1]The record in the court below was printed in a Joint Appendix, cited herein as "J.A.", nine copies of which have been filed with this Court in connection with the petition for certiorari in *Fibreboard Paper Products Corp.* v. *NLRB*, No. 610.

Report of the Trial Examiner (J. A. 44), is reported at 130 N.L.R.B. 1558. The Supplemental Decision and Order of the Board (J.A. 19) is reported at 138 N.L.R.B. 550. The opinion of the Court of Appeals is reported at 322 F. 2d 411, and is reproduced in the Appendix to this petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 3. On July 25, the court entered an order extending the time within which petitions for rehearing could be filed to and including July 31, 1963. Petitioner filed a timely petition for rehearing and rehearing *en banc*, which was denied by the court on September 27. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether Sections 8(a)(1) and (3) of the National Labor Relations Act prohibit an employer from terminating his employees, and assigning their work to an independent contractor, in order to obtain the economic advantage afforded by the fact that the contractor's employees are willing to work under less costly terms and conditions of employment than those which were previously negotiated between the employer and the union representing his own employees.

2. Whether the Board, having determined that the employer terminated his employees in violation of Section 8(a)(5) of the Act and that reinstatement with back pay was the appropriate remedy, exceeded its discretion by arbitrarily failing to award back pay for the three-year period between the date of the violation and the date of the Board's order.

## STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 provides as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158 provides in pertinent part as follows:

> "Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).
>
> * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obliga-

tion of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) provides in pertinent part as follows:

". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . ."

## STATEMENT OF THE CASE

### 1. *The Parties*

The United Steelworkers of America, AFL-CIO, together with its affiliated Local Union 1304, East Bay Union of Machinists (hereinafter jointly referred to as "the Union"), was, until the events to be described, the exclusive bargaining agent of a unit of employees of the Fibreboard Paper Products Corporation at its Emeryville, California plant. The unit consisted of maintenance mechanics and machinists, their helpers, working foremen, firemen and engineers in the powerhouse, and a storekeeper in the central supply and store room (J.A. 46).

Fibreboard is a manufacturer of building supplies, including paint, insulation and roofing materials. Its Emeryville plant regularly ships a substantial volume of finished goods in interstate commerce.

*2. The Events*

On May 26, 1959, the Union notified the Company of its desire to modify the collective bargaining agreement which was then in effect between the parties (J.A. 152). This notice was given pursuant to the following provisions of that agreement:

> "This Agreement shall continue in full force and effect to and including July 31, 1959, and shall be considered renewed from year to year thereafter between the respective parties unless either party hereto shall give written notice to the other of its desire to change, modify, or cancel the same at least sixty (60) days prior to expiration.
>
> "Within fifteen (15) days after notice of reopening is given, the opening party shall submit a complete and full list of all proposed modifications. All other sections shall remain in full force and effect. Negotiations shall commence no later than forty-five (45) days prior to the anniversary date of the Agreement unless otherwise mutually changed" (J.A. 47).

The Company acknowledged receipt of the notice by a letter dated June 2, in which it stated that "we will contact you at a later date regarding a meeting for this purpose" (J. A. 153).

On June 15, in accordance with the agreement, the Union sent the Company a list of its proposed modifications (J.A. 153-55).

Despite its statement that it would do so, the Company did not contact the Union to set a meeting date. The Union made several efforts to schedule a meeting, all of which were unsuccessful (J. A. 49). Finally, on July 27, just four days before the July 31 deadline, the Company's director of industrial relations, Mr. Thumann, telephoned the Union's representatives and told them that he had "a matter of considerable import" to discuss with them (J.A. 75). A meet-

ing was arranged for that evening at a local restaurant. When the Union's representatives arrived, Thumann handed them a letter announcing that Fibreboard had "reached a definite decision" to "let out" its maintenance work to an independent contractor, effective August 1, 1959, and that "negotiations for a new contract would be pointless" (J.A. 155-56). Mr. Thumann then described to the Union's representatives the "termination" benefits which Fibreboard intended to pay to its employees who would be displaced. He stated that a contractor had not yet been chosen, but promised to inform the Union when that decision was made. The meeting concluded with an understanding that the parties would meet again on July 30 (J.A. 50-51).

The next day, Mr. Thumann notified the Union that the contract had been awarded to Fluor Maintenance, Inc. (J.A. 51).

On July 29, the Union wrote a letter to the Company in which it pointed out that there was still an agreement in effect between the parties, that the Company had not given any 60-day notice of its desire to cancel that agreement, and that according to its terms the agreement would remain in effect for another year, subject only to the Company's duty to bargain with respect to the modifications proposed by the Union (J.A. 51).

On July 30, a meeting between the Union's negotiating committee and a Company committee took place. At the beginning of that meeting, Mr. Thumann handed the Union committee a letter responding to the Union's letter of the previous day. In it, the Company took the position that the agreement would automatically expire on July 31, that the agreement did not in any event prohibit the contracting out of work, and that "since we will have no employees in the bargaining unit covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless" (J.A. 52-53). The Union committee then stated that it wished to negotiate with respect to its pro-

posed modifications of the agreement, but the Company adhered to its position that this would be "pointless" (J.A. 84).

When asked to explain the reasons for its decision, Mr. Thumann stated that he had on several occasions in the past explained to the Union, with the aid of charts and statistics, "just how expensive and how costly our maintenance work was and how it was creating quite a terrific burden upon the Emeryville plant." He also stated that "other unions on that property had joined hands with management in an effort to bring about an economical and efficient operation" and that "we had not been able to attain that in our discussions with this particular Local" (J.A. 85).

In reply to a proposal that the Company agree to continue to have members of the Union perform the maintenance work after the contractor took over, Mr. Thumann stated that "that could not be done as we had entered into this contracting of maintenance work for economy and efficiency of operation, and for us to tie the contractor's hands in any fashion, shape or form would be senseless" (J.A. 89). He did suggest, however, that the former Fibreboard employees could apply for employment with Fluor. He said that he had informed Fluor that "we have some very capable maintenance people in all crafts," and that Fluor had indicated that it was willing to consider hiring former Fibreboard employees (J.A. 88).

At the conclusion of the meeting, Mr. Thumann wrote on the attendance sheet, next to the names of the management representatives:

> "These representatives of Fibreboard are not in attendance for Contract Negotiations but to restate their opinion that negotiations for a new contract would be pointless in view of management's intention to contract out powerhouse and maintenance work" (J.A. 159, 89).

On July 31, each maintenance employee was given a notice of termination (J.A. 56).

### 3. *The Nature of the Arrangement Between Fibreboard and Fluor*

The nature of the arrangement between Fibreboard and Fluor was not discussed in any detail either by the Board or the Court below, but it is fully revealed in two documents which are in the record: Fluor's formal proposal to Fibreboard (J.A. 139) and the actual contract which was executed on August 4 (J.A. 163). An examination of these two documents makes clear that the sole effect of the Fibreboard-Fluor agreement was to replace one group of workers, represented by one union, with another group represented by different unions. For Fluor undertook only one basic obligation: to "furnish all labor, supervision and office help required for the performance of maintenance work, operation of the boiler plant, and minor alteration and minor construction work . . . as Owner shall from time to time assign to Contractor . . ." (J.A. 160). Fluor's only other responsibility was to furnish, at Fibreboard's expense, such tools, supplies and equipment as Fibreboard ordered, "it being understood, however," that Fibreboard "shall ordinarily do its own purchasing of tools, supplies and equipment" (J.A. 160).

Fibreboard agreed to reimburse all of Fluor's costs, including wages, fringe benefits, payroll taxes, travel and subsistence expenses, utilities, telephone, telegraph, stationery, Workmen's Compensation insurance, permits, licenses, fees, and such tools and equipment as Fibreboard did not furnish. In addition, Fibreboard agreed to pay Fluor a fixed fee of $2250 per month ($27,000 per year) (J.A. 161-62). The contract was terminable by Fibreboard at any time upon sixty days' written notice (J.A. 160).

Fluor made clear in its proposal that its personnel would work entirely under the direction of Fibreboard's management. Thus, it stated:

"We propose that our day-to-day operations will be a functioning component of your organization, subject to your over-all direction. Further, we propose that the inspection of our work completions would be under the direction of Fibreboard" (J.A. 145).

It also stated:

"Our superintendent will, in all practical purposes, report to Fibreboard plant management. He will become an integral part of your operating organization and will work energetically and cooperatively toward accomplishing your management orders and objectives" (J.A. 141).

Finally, it stated:

"Our recommendations for supervisors are always submitted to your management for consideration and appraisal of their background of experience and qualifications before any assignments are made. The number of supervisors and office overhead is always under your direct control and subject to your approval in accordance with the assigned work load. This force is quite flexible and subject to modification to meet the day-to-day efficiency requirements" (J.A. 140-41).

In its proposal to Fibreboard, Fluor emphasized the advantageous relationships it had with certain labor organizations (other than those involved in this case). It tendered to Fibreboard a sample of the type of labor contract which it had negotiated elsewhere, and which it had been assured of obtaining for Fibreboard as well. It pointed out in detail the advantages which such an agreement would provide:

"This type of labor contract makes available the skilled craftsmen who are familiar with maintenance and construction work but eliminates many of the labor problems encountered when owners perform mainte-

nance with their own crews or with subcontractors who use Building Trades working conditions. Examples of benefits in this type of proposed contract are:

> "Elimination of most of the fringe benefits, such as travel time, subsistence, vacation pay, sick leave, termination pay, paid holidays, etc.
>
> "We retain the right of complete selection and determination of a craftsman's ability and production.
>
> "Right to terminate employees or reduce work forces at any time.
>
> "Mixed crew assignments with considerable jurisdictive assignment latitude.
>
> "Elimination of any work quotas or work slowdown methods.
>
> "Maximum utilization of man-hour savings, tools or equipment.
>
> "Right to enforce high rates of production from all maintenance employees" (J.A. 146-47).

Fluor also stated that "labor has assured us of a cooperative endeavor that will give us greater production through our labor forces which will result in giving Fibreboard a lower cost on their maintenance work" (J.A. 147).

4. ***The Proceedings Before the Board***

Upon charges filed by the Union, the Regional Director of the NLRB, on September 2, 1959, issued a complaint alleging that the Company, by its actions, had discriminated in regard to the hire, tenure, terms or conditions of employment of its maintenance employees, thereby discouraging membership in the Steelworkers Union, in violation of Section 8(a)(3) of the Act; had interfered with, restrained and coerced its employees in the exercise of their right to engage in concerted activities, in violation of Section 8(a)(1) of the Act; and had failed to bargain in good faith, in violation of Section 8(a)(5) of the Act (J.A. 5-9). An an-

swer was duly filed by the company (J.A. 10), and on September 21 and 22, 1959, the matter was heard before Trial Examiner Howard Myers.

On November 27, 1959, the Trial Examiner issued his Intermediate Report and Recommended Order (J.A. 44). He found the facts to be essentially as we have described them above, except that he made no detailed findings as to the nature of the arrangement between Fibreboard and Fluor.

Most of the Examiner's opinion was devoted to the question of whether the company's action was "illegally motivated" (J.A. 56). Finding that the company made its decision after extensive cost studies, and on the basis of a good faith business judgment that it could save a substantial sum of money by having Fluor perform the maintenance work formerly performed by Fibreboard's employees, he concluded that the Company had not violated Sections 8(a)(1) and (3) of the Act (J.A. 58-60).

On the question of whether the employer violated its duty to bargain with the Union, the Trial Examiner held that the Company was under no obligation to give notice of a desire to terminate the collective bargaining agreement because it "terminated" by its own terms on July 31, 1959, and that the employer had no duty to bargain about a new contract since the bargaining unit ceased to exist after July 31. He did not discuss at all the question of whether the Company was obligated to bargain with respect to its decision to contract out the maintenance work.

All parties filed exceptions to the Trial Examiner's Report with the Board. On March 27, 1961, the Board rendered its first Decision and Order in this case (J.A. 35). In it, the Board agreed with the Trial Examiner in his conclusions, and then turned to a question ignored by the Trial Examiner—whether the Company had a duty to bargain with the Union as to its decision to contract out the maintenance work. On this question the Board held, Member Fanning

dissenting, that the Act does not require an employer to bargain about a decision to terminate employees, but only about the rights and benefits to be accorded employees upon termination. It conceded that there were cases in which the Board had held that there is a duty to bargain with respect to the elimination of jobs, but concluded that that duty exists only where such action has an effect on the employment conditions of employees remaining in the unit (J.A. 38). In other words, the Board held that an employer must bargain with the representatives of its employees when it proposes to contract out the work of *part* of a bargaining unit, but not when it proposes, as here, to contract out the work of an *entire* bargaining unit.

Member Fanning, in his dissent (J.A. 39), did not accept this distinction. He noted that his dissent was merely "a restatement of what is already the law by virtue of the Supreme Court's decision in the *Railway Telegraphers* case [362 U. S. 330]," and that, moreover, the elimination of jobs had been held to be a mandatory subject of collective bargaining in a series of prior Board decisions.

The Union and the General Counsel both petitioned the Board for reconsideration of its decision. In September, 1962, the Board issued a Supplemental Decision and Order in which it reconsidered that portion of its original decision dealing with the alleged violation of Section 8 (a)(5), and held that contracting out is a mandatory subject of bargaining. It adopted the views expressed in the dissenting opinion of Member Fanning in the original decision, as well as the reasoning of its intervening decision in *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), in which it had held that the contracting out of work is a subject on which employers are required to bargain. It stated that "we do not . . . believe that the issue presented is one within the Board's discretion. In our opinion, the question is foreclosed by the Supreme Court's decision in the *Telegraphers* and other cases" (J.A. 21).

Member Rodgers dissented (J.A. 28), adhering to the views expressed in the Board's original decision.

In fashioning a remedy for Fibreboard's refusal to bargain, the Board noted that it would be futile simply to order it to "cease and desist," or to bargain about a *fait accompli*. Accordingly, in addition to issuing a cease and desist order, it ordered Fibreboard to reinstitute its maintenance operation, reinstate the ousted employees, and bargain with the union. It further ordered Fibreboard to make the employees whole for the loss of earnings suffered "as a result of Respondent's unlawful action in bypassing their bargaining agent and unilaterally subcontracting their jobs out of existence" (J.A. 25). However, the Board limited its back pay award only to the period commencing with the date of its supplemental decision and order, on the ground that "in the special circumstances of this case where the Board, upon reexamination of the relevant legal principles, has reversed its own prior determination . . . we believe it would be wholly inequitable to hold Respondent liable for back-pay from the date it initially terminated the employment of the individuals here involved" (J.A. 26, n. 21).

### 5. *The Proceedings in the Court of Appeals*

The Union filed a petition for review in the District of Columbia Circuit, seeking review of (1) the Board's failure to find that Fibreboard's action had violated Section 8(a)(3) of the Act, and (2) the Board's denial of back pay for the period prior to the supplemental decision and order.

The Company also filed a petition for review, challenging those aspects of the Board's decision and order which were unfavorable to it, and also contending that the Board had committed certain procedural irregularities. The Board cross-petitioned for enforcement of its order.

The Court of Appeals affirmed the Board's decision in its entirety, and enforced the Board's order. The court's opinion dealt at length only with the question raised by the

company's petition for review, as to the validity of the Board's decision that Fibreboard had violated Section 8(a)(5). The Court concluded that the Board was correct in holding that the Act requires an employer to bargain collectively before terminating employees and contracting out their work, and that the Board's finding that Fibreboard had not in fact bargained was supported by substantial evidence.

With respect to the Union's contention that the Board had erred in failing to find a violation of Section 8(a)(3), the court said the following:

> The General Counsel's case in support of the Section 8(a)(3) charge rested on proof of overt acts from which it sought to persuade the Board to draw inferences of anti-union animus. The evaluation of such evidence is a process peculiarly within the seasoned experience of the Board and we see no basis for disturbing its finding that no Section 8(a)(3) violation was proven.

The Court did not deal at all with the Union's main argument, which was that anti-union animus is not an essential ingredient of an 8(a)(3) violation, and that the conduct of the Company in this case should be held to violate that section irrespective of whether it was motivated by anti-union considerations or economic considerations.

With respect to the Board's tolling of back pay for the three-year period between the violation and the Board's order, the court simply held that the Board had not exceeded its wide latitude in fashioning remedies under the Act. The Court did not deal with the union's contention that the Board's discretion, however broad it might be, should not permit the Board, once it finds that an award of backpay is necessary to effectuate the purposes of the Act, to deny backpay solely on the basis of the entirely irrelevant fact that the Board originally issued an erroneous decision on the

merits, which it subsequently reversed on reconsideration. *Cf. APW Products, Inc.*, 137 N.L.R.B. 25 (1962), *enforced* 316 F. 2d 899 (2d Cir. 1963).

In No. 610, now pending before this Court, Fibreboard has petitioned for certiorari with respect to those portions of the decision below which were adverse to it. By this petition, we seek review of those portions of the decision below which were adverse to the Union.

## REASONS FOR GRANTING THE WRIT

From the beginning, this case has involved two closely related issues:

(1) Whether Fibreboard violated Section 8(a)(3) of the Act by terminating its maintenance employees and assigning their work to an independent contractor, and

(2) Whether Fibreboard violated Section 8(a)(5) of the Act by taking this action without bargaining with the union representing the employees affected.

Both the Board and the court of appeals decided the first issue in favor of the Company, and the second in favor of the Union. The Company has petitioned for certiorari with respect to the 8(a)(5) issue. *Fibreboard Paper Products Corp.* v. *NLRB*, No. 610, October Term, 1963. In view of the conflict between the decision below and the decision of the Eighth Circuit in *NLRB* v. *Adams Dairy, Inc.*, 322 F. 2d 553 (1963), we do not oppose that petition, although we agree with the Board that Section 8(a)(5) requires an employer to bargain concerning any contemplated elimination of jobs or termination of employees. See *Order of Railroad Telegraphers* v. *Chicago & N.W.R.R.*, 362 U. S. 330 (1960); *NLRB* v. *Brown Dunkin Co.*, 287 F. 2d 17 (10th Cir. 1961); *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946) *set aside on other grounds*, 161 F. 2d 949 (6th Cir. 1947); *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F. 2d 846 (5th Cir. 1963).

We urge, however, that the Court grant certiorari with respect to the 8(a)(3) issue as well, for the following reasons:

1. Both of the issues in this case turn, in the end, upon a single underlying question: to what extent must the right of an employer to terminate his employees and assign their work to an independent contractor, be limited in order to protect the right of employees, guaranteed in Section 7 of the Act, to organize and bargain collectively through representatives of their own choosing. Sections 8(a)(3) and 8(a)(5) are, after all, simply two subsections of a single statute which is designed to implement a single policy, expressed in Section 7. Indeed, any violation of either 8(a)(3) or 8(a)(5) is automatically a violation of Section 8(a)(1), which prohibits any interference by employers with the exercise of Section 7 rights.

The theory of the Board's decision appears to be that when an employer wishes to contract out work which is being performed by his own employees because a contractor will do the work at less cost, the only obligation of the employer under the Act is to bargain collectively with his employees' representative before taking such action. The Board made no distinction between a case, such as is presented here, in which the contractor's only economic advantage is that his employees work under less costly terms and conditions of employment, and a case in which the contractor is able to do the work at less cost because of some other advantage, such as superior technology or economies of scale. We contend, on the other hand, that if an employer terminates his own employees and assigns their work to an independent contractor solely because the contractor's employees are willing to work under less costly terms and conditions of employment, then the employer has violated the Act and interfered with his employees' Section 7 rights irrespective of whether he bargains collectively before taking that action. The fact that the employer can validly say, in such a situation, that his action is

motivated by economic considerations does not, in our view, negate the fact that he is nevertheless discriminating against his own employees because of their union affiliation and activity in violation of Section 8(a)(3). This, in brief, is the difference between our position and that of the Board.

The Board's conclusion that Fibreboard had not violated Section 8(a)(3) was based solely on the Trial Examiner's finding that Fibreboard's action was motivated by a desire to save money. (J.A. 36, 56-60). Neither the Examiner nor the Board made any specific finding as to the nature or source of the economic advantage which Fibreboard hoped to gain by its action, since under the approach they took to this case that question was irrelevant. It is perfectly plain from the record, however, that the sole advantage which Fibreboard gained from its arrangement with Fluor was that Fluor had more favorable labor agreements with the unions representing its employees than Fibreboard had with the union representing its own employees.

Indeed, the sole effect of the Fibreboard-Fluor contract was to replace one group of workers, represented by one union, with another group represented by other unions. Fluor undertook one basic obligation: to "furnish all labor, supervision and office help required" for the performance of the work formerly performed by Fibreboard employees (J.A. 160). Fibreboard agreed that it would ordinarily purchase all of the tools, supplies, and equipment needed by Fluor (J.A. 160), and agreed to reimburse all of Fluor's costs, including wages, fringe benefits, payroll taxes, travel and subsistence expenses, utilities, telephone, telegraph, stationery, Workmen's Compensation insurance, permits, licenses, fees, etc. (J.A. 161-162). Fluor agreed that its personnel would work entirely under the direction of Fibreboard's management (J.A. 141, 145), and agreed that its selection of supervisors would be subject to Fibreboard's approval (J.A. 140).

Since the net effect of the entire transaction was to re-

place one group of employees with another, with Fibreboard continuing to bear all the risks, all the costs, and all the basic managerial responsibilities, how did it result in lower costs?

The explanation can be found in Fluor's formal proposal to Fibreboard, which included a sample of the type of labor contract which it had negotiated elsewhere (with unions other than the one which represented Fibreboard's employees), and which Fluor anticipated it could obtain for Fibreboard as well. The advantages of this type of labor agreement were described by Fluor as follows:

> "This type of labor contract makes available the skilled craftsmen who are familiar with maintenance and construction work but eliminates many of the labor problems encountered when owners perform maintenance with their own crews or with subcontractors who use Building Trades working conditions. Examples of benefits in this type of proposed contract are:
>
> "Elimination of most of the fringe benefits, such as travel time, subsistence, vacation pay, sick leave, termination pay, paid holidays, etc.
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> "We retain the right of complete selection and determination of a craftsman's ability and production.
>
> "Right to terminate employees or reduce work forces at any time.
>
> "Mixed crew assignments with considerable jurisdictive assignment latitude.
>
> "Elimination of any work quota or work slowdown methods.
>
> "Maximum utilization of man-hour savings, tools or equipment.

"Right to enforce high rates of production from all maintenance employees (J.A. 146-47).

Fluor also stated that "labor has assured us of a cooperative endeavor that will give us greater production through our labor forces which will result in giving Fibreboard a lower cost on their maintenance work" (J.A. 147).

Fibreboard has never really denied that this was the reason it decided to engage Fluor to perform the work formerly performed by its employees. Indeed, Fibreboard's manager of industrial relations stated at the hearing that the company took the action it did because the union had not co-operated with management, as other unions had done, "to bring about an economical and efficient operation." (J.A. 85).

In the context of these facts, we disagree with the holding of the Board and the court below that Fibreboard's only violation consisted of its failure to bargain with the union before terminating the employees and assigning their work to Fluor. In our view, even if Fibreboard had bargained with the union before it had acted, the action which it took would nevertheless have undermined the rights of employees protected by Section 7. Plainly, the Act does not merely give employees the right to be consulted before they are discharged because of their union activities—it gives them an absolute right not to be discharged because of union activities. And to discharge employees solely because the terms and conditions of employment which they have established through collective bargaining are too high is, we contend, to discharge employees because of their union activities.

This does not mean, of course, that Fibreboard was required by law to continue forever to bear the employment costs required by the Steelworkers agreement. The Act provides a procedure for resolving problems of that kind. If

the existing work force cannot be persuaded, through collective bargaining, to agree to modify the existing terms and conditions of employment, the employer can, after impasse is reached, make the changes he wants in the terms and conditions of employment. See *NLRB* v. *United Brass Works*, 287 F. 2d 689, 697-98 (4th Cir. 1961); *NLRB* v. *Andrews Jergens Co.*, 175 F. 2d 130, 136 (9th Cir. 1949). If the employees strike, the employer is free to replace them. *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333 (1938). But he is not free to replace them if they do not strike. Nor may he replace them simply because he thinks they might strike if he attempts to institute changes. The right to organize and bargain collectively would be a hollow right indeed if an employer who believes the union representing his employees has pushed his employment costs too high is permitted to work out an arrangement by which a contractor will supply him with another work force represented by a more cooperative union, or by no union at all.[2]

Nor is it sufficient to hold, as did the Board and the court below, that all an employer is obliged to do in these circumstances is bargain with the union as to whether to contract out the work. That principle is applicable where there are other valid business reasons for contracting out. It is

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[2] In a number of recent cases, the Board has found a violation of 8(a)(3) where an employer faced with an economic problem relating to labor costs has attempted to solve it by eliminating the employees involved, rather than by attempting to work the problem out through collective bargaining. *Edmund A. Gray Co.*, 142 N.L.R.B. No. 70, 53 L.R.R.M. 1110 (1963) (employer discharged all female employees when union demanded that they receive the same wages as men); *MV Liberator*, 136 N.L.R.B. 13 (1962) (shipowners discharged their crews when union refused to agree to lower wages to meet lower prices, and hired new crews represented by other union willing to agree to employer proposals); *Weyerhauser Co.*, 134 N.L.R.B. 1371 (1961) (company merged bargaining units to avoid organization of one unit by a union whose economic demands it felt unable to meet). See also *NLRB* v. *Glueck Brewing Co.*, 144 F. 2d 847 (8th Cir. 1944).

not applicable, we believe, where the employer's sole objective is to have the work done under more favorable terms and conditions of employment. In our view, an employer may not achieve that objective by replacing his existing work force with another, either directly or through the subcontracting device, unless his own workers demonstrate their unwillingness to accept the employer's terms by engaging in an economic strike.

In short, this case presents what is essentially a three-sided controversy. The Board contends that Fibreboard violated the Act only in so far as it failed to bargain before terminating the employees and contracting out their work. Although we agree with the underlying principle of the Board's decision that the contracting out of bargaining-unit work is a subject upon which employers are required to bargain under the Act, we believe that the essential violation in this case was not the failure to bargain, but the contracting out itself. In our view, the Act flatly prohibits such action for the purpose of escaping the terms and conditions of employment established through collective bargaining. Fibreboard, of course, contends that it did not violate the Act in any respect.

Obviously, the only way this Court can intelligently resolve this three-sided dispute is to hear all three sides. This can be accomplished only by granting both petitions for certiorari.

2. The decision of the Board and of the court below that Fibreboard's action did not violate Section 8(a)(3) is independently worthy of review on certiorari, because of the conflict between that decision and prior decisions of this Court.

As we have seen, the Board's conclusion that Fibreboard did not violate Section 8(a)(3) was based solely on its finding that Fibreboard was motivated by economic or business

considerations rather than anti-union animus. The necessary predicate for that decision is the assumption that anti-union animus is an essential ingredient of an 8(a)(3) violation. That assumption is in direct conflict with the recent decision of this Court in *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963), as well as the earlier decisions in *Radio Officers* v. *NLRB*, 347 U. S. 17 (1954) and *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945). In each of these cases, the Court sustained a finding that an employer had violated Section 8(a)(3) despite the fact that in none of them was the employer motivated by anti-union animus.

In *Republic Aviation*, the violation consisted of the discharge of employees for wearing union buttons in the plant in violation of a company rule. The discharges "were found not to be motivated by opposition to the particular union or, we deduce, to unionism." 324 U. S. at 795. Nevetheless, the Court affirmed the Board's decision that the discharges violated 8(a)(3).

In *Radio Officers*, the Court decided three separate cases in a single opinion, the most relevant of which for present purposes was *NLRB* v. *Gaynor News Co.* In that case, the employer made certain retroactive wage payments to its union-member employees, but not to nonmembers. The Court assumed, for purposes of its decision, that "the employer acted from self-interest and not to encourage unionism," but nevertheless affirmed the Board's finding of an 8(a)(3) violation.

If these cases could have left any lingering doubt as to whether a finding of anti-union animus was essential to a finding of an 8(a)(3) violation, that doubt was removed by this Court's decision in *Erie Resistor*. The specific question in that case was whether the employer had violated Section 8(a)(3) when it granted employees who were willing to work during an economic strike 20 years of artificial "superseniority," the effect of which was to assure that in

future layoffs and recalls, they would have preference over other employees who had refused to work during the strike. The Board found that the employer was not motivated by any desire to injure the union or the strikers; his purpose was simply to obtain workers to run his plant. Nevertheless, the Board held that since the employer had discriminated on the basis of the employees' union activities and since the effect of the discrimination was necessarily to discourage such union activities, the employer had violated Section 8 (a)(3). 132 N.L.R.B. 621 (1961).

The Third Circuit reversed the Board, holding that anti-union motivation is an essential ingredient of an 8(a)(3) violation:

> "An employer in the ordinary management of his affairs may be required to make business decisions discriminatory in their probable consequences. Such discrimination is not in and of itself illegal. The discrimination proscribed by Section 8(a)(3) as an unfair labor practice is that which is motivated by a desire 'to encourage or discourage membership in any labor organization.'" 303 F. 2d 359, 361-62.

This Court reversed the Third Circuit and sustained the Board, on the ground that "the Court of Appeals erred in holding that, in the absence of a specific illegal intent, a legitimate business purpose is always a defense to an unfair labor practice charge."

The crux of the Court's opinion is contained in the following two paragraphs:

> "Though the intent necessary for an unfair labor practice may be shown in different ways, proving it in one manner may have far different weight and far different consequences than proving it in another. When specific evidence of a subjective intent to discriminate

or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46 (discharging employees); *Associated Press* v. *Labor Board*, 301 U. S. 103, 132 (discharging employees); *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177 (hiring employees). Compare *Labor Board* v. *Brown-Dunkin Co.*, 287 F. 2d 17, with *Labor Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848 (subcontracting union work); and *Fiss Corp.*, 43 N.L.R.B. 125, with *Jacob H. Klotz*, 13 N.L.R.B. 746 (movement of plant to another town). Such proof itself is normally sufficient to destroy the employer's claim of a legitimate business purpose, if one is made, and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged. Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights. The employer's claim of legitimacy is totally dispelled.

"The outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out. *Radio Officers* v. *Labor Board, supra.* But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but

to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." 373 U. S. at 227-29 (footnotes omitted).

In the present case, Fibreboard has asserted precisely the defense which the employer in *Erie* had relied upon: "that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act." In *Erie*, this Court held that this is not an absolute defense, and that the Board must nevertheless balance "the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner" in order to determine whether an 8(a)(3) violation has been committed.

Yet in the present case the Board treated the employer's defense as absolute. It made no effort whatever to apply the balancing test which this Court approved in *Erie*. Accordingly, the decision of the Board and the court below with respect to the 8(a)(3) issue in this case would seem to be independently worthy of review by this Court. *A fortiori*, if the Court decides to grant review with respect

to the 8(a)(5) issue, there is no basis for denying certiorari with respect to the other substantial and closely related issue in this case.

## CONCLUSION

For the reasons stated this petition for certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## UNITED STATES COURT OF APPEALS
**For the District of Columbia Circuit**

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No. 17275

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
FIBREBOARD PAPER PRODUCTS CORPORATION, INTERVENOR

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No. 17468

FIBREBOARD PAPER PRODUCTS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO, INTERVENORS.

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On Petitions To Review and Cross-Petition For Enforcement Of A Decision And Order Of The National Labor Relations Board

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Decided July 3, 1963

Before DANAHER, BASTIAN and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge:* These are consolidated petitions for review of an order of the National Labor Relations Board. Cross motions for intervention have been granted. In response, the Board seeks enforcement of its order.

Fibreboard Paper Products Corporation, petitioner in No. 17468, is engaged in the manufacture, sale and distribution of paint, industrial insulation, floor covering and related products, operating twenty plants in five states. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, petitioner in No. 17275, until the events described below, had been the exclusive bargaining agent of the unit of maintenance employees at Fibreboard's Emeryville, California, plant.[1] The Union and the Company had had a history of collective bargaining dating from 1937. At the time of the events relevant to this case, the parties had a one year collective bargaining agreement terminating July 31, 1959. The contract provided for automatic renewal for another year unless one of the contracting parties gave sixty days notice of a desire to modify or terminate the contract. On May 26, 1959, the Union gave such a notice and sought to arrange a bargaining session with Company representatives. The Company was not cooperative in arranging a meeting and the representatives of the Company and the Union did not meet until July 27.

During the period when the Union was seeking to negotiate a new contract, the Company was considering contracting out its maintenance work to an independent contractor. By July 27, four days before the end of the contract term and approximately two months after the Union's notice, the Company had decided to contract out all its maintenance work then being performed by 73 men. A meeting with representatives of the Union was arranged the afternoon of that day. At this meeting the Union agents were handed copies of a letter from the Company which stated in pertinent part:

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[1]The employees in the unit included maintenance mechanics, electricians and helpers, working foremen, firemen and engineers employed in the powerhouse, and the storekeeper in the central supply and storeroom.

> For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.
>
> In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

No negotiations were attempted during the remainder of that meeting. On July 30 another meeting was held at the Union's request for the purpose of bargaining about a new contract. At that time the Company representatives restated their position that they were not prepared to negotiate with the Union on the question. On July 31, the employment of the 73 maintenance workers, including 50 represented by the Union, was terminated and employees of the subcontractor went on the job.

The Union filed charges against the Company and the Board's Regional Director issued a complaint alleging violations of Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Labor Act. 29 U.S.C. §§ 158(a)(1), 158(a)(3), 158(a)(5). Hearings were held and the Trial Examiner filed his Intermediate Report recommending dismissal of the complaint. The Board accepted the Examiner's recommendations and dismissed the complaint. 130 NLRB 1558. The General Counsel and the charging Union filed petitions for reconsideration which were granted. On reconsideration, the Board modified its original decision to the extent of finding that the Company had violated Section 8(a)(5) "by unilaterally subcontracting its maintenance without bargaining with the . . . [Union] over its decision to do so." The Board issued an appropriate cease and desist order in light of its findings and in addition, affirmatively ordered the Company to restore its maintenance operations and offer reinstatement with back pay to the displaced employees. The

Board ordered that back pay be calculated from the date of the Board's supplemental decision and order to the date of the Company's offer of reinstatement to the employees in question. The Supplemental Decision and Order did not modify the original decision with respect to the dismissal of the charges under 8(a)(1) and 8(a)(3). 138 NLRB No. 67.

In its petition for review, the Company argues that (a) it had no duty to bargain about its decision to contract out the maintenance work performed by a unit of approximately 73 employees; and (b) there was no appropriate finding that it refused to bargain about its decision to contract out and that any such finding would not be supported by substantial evidence on this record. The Union challenges (a) the Board's failure to find a violation of Section 8(a)(3) and (b) the Board's failure to make the remedial order of back pay operative to the date of termination of employment:

(1)

The record clearly shows that the Company met with the Union to announce that it had decided to contract out the maintenance work, and that it would not bargain on this decision. This position was consistent with the Company's belief that contracting out was exclusively a "management prerogative" about which it could take unilateral action without first bargaining to impasse with the Union. The Board's opinions indicate that a finding of refusal to bargain was made by the Board. There is substantial evidence to support the Board's conclusion that the Company refused to bargain.

(2)

The facts of this case present the situation where the implementation of a decision to contract out the maintenance work, prompted by economic motives, extinguished the en-

tire collective bargaining unit by terminating the employment of all of the members in that unit. In its supplemental decision and order the Board held that Fibreboard was under a duty to bargain with the Union on the proposed subcontracting before it took unilateral action.

It is important to point out certain issues which are not raised by this appeal, in order to define the limits of the issue we are deciding. We are not asked to evaluate a proposal made by management during the course of bargaining to determine whether it relates to a mandatory subject of bargaining within the intendment of Section 8d of the Act, *National Labor Relations Board* v. *Borg-Warner,* 356 U.S. 342 (1958), nor are we asked to evaluate unilateral action concerning conditions of employment taken during negotiations. *National Labor Relations Board* v. *Katz,* 369 U.S. 736 (1962); we are not asked to evaluate the propriety of unilateral action taken after negotiations have reached an impasse, *National Labor Relations Board* v. *Intercoastal Terminal, Inc.,* 286 F. 2d 954 (5th Cir. 1961), nor are we asked to resolve issues relating to the scope of an arbitration clause in a collective bargaining agreement, *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U. S. 574 (1960).

Here the Company did not acknowledge that collective bargaining was essential as a preliminary to terminating the employment of an entire bargaining unit, nor did the employer bargain to impasse before taking unilateral action of contracting out all of the plant's maintenance work. Thus we are faced with the employer's contention that he was under no legal duty to bargain with the Union prior to contracting out the maintenance work. If the employer had the right unilaterally to terminate the employment of all employees making up a bargaining unit by contracting out the work, there would, of course, be no point in bargaining for a renewal of the existing contract. The work performed by its former employees would be performed by employees of a subcontractor.

The purpose of imposing legal duties upon employers to meet and bargain with the representatives of employees is to create a structure of industrial self-government for a particular plant arrived at by consensual agreement between management and employees within the framework of the statute. See *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 580-81 (1960). By guaranteeing employee participation in decisions relating to wages, hours, terms and conditions of employment, Congress made a determination that this would create an environment conducive to industrial harmony and eliminate costly industrial strife which interrupts commerce.

In framing Section 8(d) of the Act, 29 U.S.C. § 158(d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively. The statutory definition of those subjects about which the parties were required to bargain was of necessity framed in the broadest terms possible: wages, hours, terms and conditions of employment. The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions. Congress left it to the Board, in the first instance, to give content to the statutory language, subject to review by the courts. *Richfield Oil Corp.* v. *National Labor Relations Board*, 97 U. S. App. D. C. 383, 231 F. 2d 717, *cert. denied*, 351 U. S. 909 (1956).

The employer's contention in essence is that its unilateral action was justified because it was motivated solely by economic necessity and that the Board's rejection of the Union's Section 8(a)(3) claims shows the absence of any anti-union animus. But the Board's final conclusions do not rest on a basis of improper motivation. It is not necessary to find an anti-union animus as a predicate for a conclusion that the

employer violated Section 8(a)(5) which commands good faith bargaining on wages, hours and terms and conditions of employment. It is enough that management's reasons for its proposal might have been deemed satisfactory by and have been acceptable to the Union. It is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly. By way of illustration: the union, after hearing management's side of the problem, might concede the justice of the claims and agree to invoke union discipline to increase productivity and reduce costs. Specifically it might proffer a six months trial period in which either productivity would be increased with the existing force of 73 men or maintained with a reduced force to effect the economies desired by management.[2] It has been so often pointed out that no citation is called for that the obligation to bargain is not an obligation to agree. The basic concepts underlying the Labor Management Relations Act call for utilization of joint efforts at the bargaining table as a substitute for labor strife.

Having in mind the broad powers conferred on the Board by Congress and our limited scope of review, we conclude on this record that the Board was warranted in its determination that the employer violated Section 8(a)(5) by refusing to bargain before terminating the employment of all the members of its maintenance force.

(3)

The General Counsel's case in support of the Section 8(a)(3) charge rested on proof of overt acts from which it sought to persuade the Board to draw inferences of anti-

[2] Paradoxically the employer concedes that it would have been interested in possible solutions which the union might have offered but its course of action foreclosed negotiation at the threshold.

union animus. The evaluation of such evidence is a process peculiarly within the seasoned experience of the Board and we see no basis for disturbing its finding that no Section 8 (a) (3) violation was proven.

(4)

Finally the Union challenges the Board's action in dating the back pay remedy only from the date of the Board's Supplemental Decision and Order. The Union relies on *A.P.W. Products, Inc.*, 137 NLRB No. 7, enforced, —— F. 2d —— (2d Cir. 1963). We think it sufficient to point out that in that case it was the Board which chose to modify its long-standing practice with regard to tolling of back pay between the Intermediate Report favorable to an employer and a subsequent reversal by the Board, and the Court of Appeals enforced the order. In the present case the Board has framed what it deems to be an appropriate remedy and we see no basis to depart from the general rule of allowing the Board wide latitude in shaping remedies. See *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344 (1953); *Phelps-Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177 (1941); *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533 (1943).

*The Board's order will be enforced.*

## UNITED STATES COURT OF APPEALS

**For the District of Columbia Circuit**

**(Caption Omitted)**

On Petitions to Review and a Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

Before: Danaher, Bastian and Burger, Circuit Judges.

### JUDGMENT

These cases came on to be heard on the record from the National Labor Relations Board, and on petitions to review and a cross-petition for enforcement of, the order of the National Labor Relations Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in these cases will be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Curiam.

Dated: July 3, 1963.